Supreme Court, U.S.
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No. 08-

08-646

IN THE

Supreme Court of the United States

STEPHANIE DUKES, INDIVIDUALLY, STEPHANIE DUKES, AS INDEPENDENT EXECUTOR OF THE ESTATE OF MYRON DUKES, DECEASED, *ET AL.*,

Petitioners,

v.

PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS, P.C., PHILIP JOHNSON, RITCHIE & FIORE ARCHITECTS, P.C., ALAN RITCHIE/DAVID FIORE ARCHITECTS, P.C., DAVID G. WHITNEY AND JOEL S. EHRENKRANZ, EXECUTORS OF THE ESTATE OF PHILIP JOHNSON, DECEASED, ALAN RITCHIE, PETER JOHANTGEN CONSULTING, INC., PETER JOHANTGEN, AUSTIN COMMERCIAL, INC.,EMILE KELLER, AND HUITT-ZOLLARS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT OF TEXAS COURT OF APPEALS, FT. WORTH, TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can Texas's Appellate Courts legislate that a construction professional's ethical duties and recognized professional standards can be ignored as a matter of law when determining whether such professionals owed a duty to citizens of one state who visit another state?

May a court completely ignore foreseeability when determining whether a construction professional owes a duty to third parties when such professional contracts for services related to a public landmark?

PARTIES TO THE PROCEEDING

Plaintiffs /Petitioners are:

STEPHANIE DUKES, Individually, STEPHANIE DUKES, as Independent Executor of the Estate of MYRON DUKES, Deceased, STEPHANIE DUKES, as Independent Executor of the Estate of CHRISTOPHER DUKES, Deceased, STEPHANIE DUKES, as Independent Executor of the Estate of LAUREN DUKES, Deceased, LOTTIE JAQUESZIAN DUKES, Individually,MYRON JAMAL DUKES, Individually, by his Mother and Next Friend, GLENDA MAGHETT, ALEXANDRA DEADMON, Individually, FRUENZE DEADMON, Individually, ALEXANDRA DEADMON and FRUENZE DEADMON, as Independent Co-Executors of the Estate of JUANITRICE DEADMON, Deceased, F R U E N Z E DEADMON, JR., Individually, by his Parents and Next Friends, ALEXANDRA DEADMON and FRUENZE DEADMON, CAMERON DEADMON, Individually, by his Parents and Next Friends, ALEXANDRA DEADMON and FRUENZE DEADMON,GEMMIA DEADMON, Individually, by her Parents and Next Friends, ALEXANDRA DEADMON and FRUENZE DEADMON.

The Respondents are listed in the caption.

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OPINION BELOW

Petitioners filed this action in the 141st district court, Tarrant County, Texas. The district court granted Respondents' motion for summary judgment on April 10, 2007. The trial order is reported at *Dukes v. Johnson*, 2007 WL 5090751 (Tex. Dist. Apr. 10, 2007) (NO. 141-207538-04). (App. B) On appeal of that order, the court of appeals for the second district of Texas, Fort Worth, entered its opinion affirming the trial court's granting summary judgment on March 27, 2008. The court of appeals opinion is reported at *Dukes v. Philip Johnson/ Alan Ritchie Architects, P.C.*, et. al., 252 S.W.3d 586 (Tex. App. – Fort Worth, 2008). (App. A)

BASIS FOR JURISDICTION

The Texas Supreme Court denied review on June 27, 2008, and denied the motion for rehearing of the petition for review on August 15, 2008. (App. C and App. D, respectively) The jurisdictional grant in 28 U.S.C. § 1257(a) serves as the basis for this Court's jurisdiction.

The instant matter is properly before this Court for writ of certiorari because via the opinion issued below by the Texas appellate court, Texas summary judgment procedure, based squarely on Federal Rule of Civil Procedure 56(c), conflicts with the accepted federal and state summary judgment standards. Liability for negligence is, often, and most precisely, a mixed question of law and fact. The Texas Supreme Court erred in refusing to address the appellate court's holding that professional ethics may be ignored *in toto* when granting

summary judgment on the element of duty in a negligence case involving citizens of the State of Illinois against citizens of the State of Texas.

As the Texas Legislature directly sourced FED. R. CIV. P. 56(c) in promulgating its summary judgment statute, Rule 166a, there is no question that federal summary judgment procedure informs Texas's.

FEDERAL RULE OF CIVIL PROCEDURE 56(c) imparts:

> The judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

TEXAS RULES OF CIVIL PROCEDURE, Rule 166a(c) states:

> The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, shat that, except as to the amount of damages, there is no genuine issue of material fact and

> the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

1. A portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States,

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. FEDERAL RULE OF CIVIL PROCEDURE 56(c) imparts:

> The judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

3. TEXAS RULES OF CIVIL PROCEDURE, Rule 166a(c) states:

> The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, shat that, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

INTRODUCTION

The case was heard in the court of first impression without live testimony to a jury, upon contradicting summary judgment evidence and expert testimony establishing a standard of professional care for engineers and architect, wherein Texas' Second Court of Appeals eliminated any argument that architects and engineers should perform their contractual duties and/or duty of care pursuant to any professional ethics, standards or guiding principles. It also eliminated any possibility that an architect or engineer in Texas would owe a duty of care to a citizen of another state.

However, fairness and a need to eliminate known dangers in public facilities demand that all U.S. citizens ought to have reasonable assurance that known safety hazards in public facilities have been addressed by architects and engineering professionals, especially those who have undertaken to address safety issues. Conversely, innocent or "good faith" construction professionals ought to know whether or not they may be held liable for any alleged safety hazards observed during their contractual assignments and what standards, if any, apply to the services they have contracted to perform.

The Texas Court of Appeals' holding will now absolve all professionals of any responsibility for safety in the design, construction, or evaluation of state, city or county facilities – despite that city and state officials contract for their specialized expertise. In doing so, the Court of Appeals has now fashioned an exceptional no-duty rule for the tort and contractual claims that municipalities and individuals formerly were able to bring against architects, engineers and the professionals who contract to design, advise and provide professional services on public facilities. By refusing to hear the appeal, the Texas Supreme Court has left innocent citizens with no options as it relates to the public landmarks that have been inspected by architects and engineers under an "opt-out" safety responsibility clause. It has also left uncertainty among design professional as to which state laws might be used against them should a claim be made with respect to safety hazards. Knowing whether one has a cause of action and knowing those claims for which design professionals may be held liable is a fundamental component of Due Process.

This Court's determination of the issues presented in this case will have long lasting effects on whether, and to what extent, municipalities, citizens and visitors can take solace in visiting public landmarks knowing their safety is not at risk as a result of arguably unscrupulous engineers and architects who purposefully choose to "ignore" all safety issues so as to eliminate any legal liability should tragedy occur. This Court's review will also determine to what extent innocent architects and engineers who have abided by recognized canons of professional ethics and standards can rely on those standards to defend themselves against claims involving unknown dangers.

The current state of the law in most other states is that the work of an architect or other construction professional will conform to the standards of his or her profession. However, the Texas Court of Appeals apparently does not believe that the laws of Texas were intended to provide the type of uniformity which ensures equal and predictable treatment of all state residents and visitors. Lastly, the lower court's opinion creates a quagmire of concern with respect to the ease with which architects and other construction professionals will be able to "opt-out" of any requirement to observe and/or report safety hazards about which the construction professional knows.

At a minimum, Due Process and fairness suggest that no U.S. citizen should be forced to have to "guess" whether the facility she enters will endanger her life because the architect made the decision to opt out of reporting safety concerns. Nor should any construction professional face the uncertainty of knowing how his

professional ethics and standards impact his daily work. This Court's review is justified because the Texas Second Court of Appeal's novel and unfair decision affects millions of citizens and visitors who traverse the borders of Texas to engage in interstate commerce, as well as all U.S. citizens who visit public facilities.

STATEMENT OF THE CASE

A. Procedural History

After discovery conducted by the parties, Respondents (hereinafter "construction professionals") brought a motion for summary judgment. The parties briefed several issues, including the one discussed below, as well as contract interpretation, premises liability, and negligence. On April 10, 2007, the Trial Court signed the Final Summary Judgment granting summary judgment to all defendants. (Pet. App. at 42a)

After notice and briefing to the Texas Second Court of Appeals, the case came on for oral argument before a panel consisting of Justices McCoy, who wrote the sole opinion on the appeal, Livingston and Walker, which issued on March 27, 2008, wherein the Texas Second Court of Appeals affirmed the orders of the Trial Court granting summary judgments to the respective defendants. (Pet. App. at 41a). The court of appeals determined that Dukes failed to raise genuine issues of material fact on any of their theories of liability. *Id.*

Plaintiffs filed a timely Petition for Review with the Texas Supreme Court, which was denied on June 27, 2008. (Pet. App. at 46a). The Motion for Rehearing was denied on August 15, 2008. (Pet. App. at 47a)

B. Statement of Facts

1. Huitt-Zollars Hired by the City of Fort Worth

The Water Gardens in Fort Worth Texas were considered a public park in since at least 1974. (Pet. App. at 4a). In 1993, Fort Worth hired Huitt-Zollars to analyze the Water Gardens. (Pet. App. at 4a) Richard Zavala, the City's Director of the Parks and Recreation Department, testifies the agreement between the City and Huitt-Zollars, Inc. called for "engineering/ architectural assessment . . . inspection, testing, evaluation and recommendations regarding *all elements of the Water Gardens physical plant.*"[CR. 3852, CR. 1086-91, at 1087] Huitt-Zollars was to "*identify the primary areas of concern*", "*tabulate all problems*", provide "recommended solutions" "*with professional skill and care*". [CR. 1095-1108, §§1.2.4, 1.2.5, 1.4.2, 1.7.1][1]

Plaintiffs also presented the testimony of engineer Philip N. Buchanan, Ph.D., P.E., who discusses the standard of care. Dr. Buchanan, in part, looks to professional codes for the standard of care.[2] [CR.3783-

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[1] On February 11, 1994, Emile Keller conceded Huitt-Zollars agreed to undertake to identify the need for warnings and could have recommended constructing a safety restraints system for the Active Water Pool. [CR. 1064-1066, 1068-69]

[2] a. Engineers shall recognize that the lives, safety, health and welfare of the general public are dependent upon engineering judgments, decisions and practices incorporated into structures, machines, products, processes and devices.

(Cont'd)

3790, App. 20; CR. 1179-1184, App. 6; CR.1185-86, App. 7] Dr. Buchanan opines that the *standard of care* mandated Huitt-Zollars report all safety hazards and recommend remedial action,[3] and deviated here from the standard of care, contributing causes of the deaths. [CR.1113-1117]

2. Johnson/Ritchie Rehired and Johantgen Retained

The Water Gardens were originally designed by Philip Johnson and John Burgee. In 1999, the city of Fort Worth hired Respondents Johnson/Ritchie to

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(Cont'd)

b. Engineers shall approve or seal only those design documents, reviewed or prepared by them, which are determined to be safe for public health and welfare in conformity with accepted engineering standards.

c. Engineers whose professional judgment is overruled under circumstances where the safety, health and welfare of the public are endangered, or the principles of sustainable development ignored, shall inform their clients or employers of the possible consequences.

d. Engineers who have knowledge or reason to believe that another person or firm may be in violation of any of the provisions of Canon 1 shall present such information to the proper authority in writing and shall cooperate with the proper authority in furnishing such further information or assistance as may be required. [CR.1179-1180]

[3] Robert Zollars, CEO of Huitt-Zollars, Inc. *admits* being bound by the Canons of Ethics. [CR.1528]

perform a comprehensive review of the Water Gardens. (Pet. App. at 4a), [CR. 3942-67, App. 17] Two documents define the contract scope:

1. A *December 9, 1997 agreement* between *City of Fort Worth* and Johnson/Ritchie[4] [CR. 2596-98, App. 15][5]

2. An *April 22, 1999 agreement* between *Downtown Fort Worth, Inc.*[6] and Johnson/Ritchie [CR.3275-80, App. 16][7]

Subsequent to Johnson/Ritchie's retention by the City of Fort Worth, Respondent Johantgen, who previously worked for Johnson/Ritchie, was retained to assist Johnson/Ritchie in the 1999 Review of the Water Gardens. (Pet. App. at 11a).

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[4] This December 9, 1997 agreement is the *only* agreement involving the City.

[5] The Appellate Court ruled *"we will not examine"* the critical December 9, 1997 letter. Appellate Opinion, App. 26, page 14, footnote 4. *The December 9, 1997 agreement must be taken into account in the contract analysis because it is the only agreement involving the City of Fort Worth, as the City was never a party to the April 22, 1999 letter.*

[6] Downtown Fort Worth Inc. is a not for profit which is not related to the City of Fort Worth.

[7] The Appellate Court incorrectly states "it is *undisputed* that the April 22, 1999 agreement constituted a valid contract between the City and Johnson Ritchie, " Appellate Opinion, App. 26, page 15, footnote 5

3. Austin Commercial Hired

In 2000, the city of Fort Worth hired Respondents Austin Commercial to act as construction manager and program manager, which meant that it had "exclusive control of, and the exclusive right to control the details of the work performed" in conjunction with the project (Pet. App. at 39a).

4. Fort Worth's Custom and Practice Regarding Code Compliance

John Avila, of the City of Fort Worth gave testimony as to who had responsibility for identifying hazards:

> A. . . . The terms that we used, where you're going with that question, is who is responsible in a design team for Code compliance, and that is — that is written in the language of — and I don't know that it is in this one, but in the architect's and engineer's contracts is the responsibility for Code compliance.
>
> * * *
>
> Q. Why is it those professions' responsibility?
>
> A. Those professions are the ones that developed the working documents, construction documents, and specifications.

Q. (BY MR. FORD) Okay.

A. They determine what is going to be built.

Q. So they have the prerequisite expertise in those areas?

A. Yes. [CR. 4930-4931]

5. The City of Fort Worth Clearly Relied on the Professional Expertise of Johnson/Ritchie and Huitt-Zollars

Richard Zavala unequivocally states the City relied on Johnson/Ritchie and Huitt-Zollars for their expert advice:[8]

Q. Okay. With respect to the frequency of the draining and cleaning of the active water pool, did anyone from Philip Johnson/Alan Ritchie Architects ever advise you that that was a safety issue?

A. No.

Q. Did anyone from Huitt-Zollars ever advise you that that was a safety issue?

A. No.

---

[8] Despite this uncontradicted testimony, the Appellate Court claims there is no evidence Johnson/Ritchie and Johantgen or Huitt-Zollars undertook to "remedy a known, dangerous condition" or reliance by the City. Appellate Opinion, App. 26, page 37

* * *

Q. (BY MR. FORD) Let me restate it because it was a poorly-drafted question. If Philip Johnson/Alan Ritchie Architects, when they did their comprehensive review of the Fort Worth Water Gardens, went to the active pool and said, there's a drowning hazard at the active water pit, at where the water is, and we need to address that by recommending a safety barrier, you would not have precluded that — preclude them from putting that in their report; is that right, sir?

A. Correct.

Q. (BY MR. FORD) Similarly, if Huitt-Zollars had observed a drowning hazard at the base of the active water pool and had rec- — realized or recognized that there should be a safety barrier there, you wouldn't have precluded them from placing that in their report; is that right, sir?

* * *

Q. (BY MR. FORD) And if both of those entities had wished to place that as a Priority A in their reports, you would have

used it as a guide in your work and in your eventual work at the Water Gardens; is that right?

A. Yes. [CR. 1593]

6. Aquatic Expert Explains The Clear Drowning Hazard

Dr. Tom Griffiths, Director of Aquatics for Penn State University, explained the Active Pool was dangerous due to:

1. The absence automatic drainage or water removal system;

2. Algae at Active Water Pool create a slipping hazard.

3. The absence of guardrails or other safety barriers.

4. The absence of handholds, stairs, or means to exit pool.

5. The water drives into the pool creating strong downward forces and aerated water, reducing the body's buoyancy.

[CR.3674-92, App. 21]:

7. The Ignored Safety Hazards Cause Four to Drown

On June 16, 2004, Myron Dukes, Christopher Dukes, Laurent Dukes and Juanitrice Deadmon drowned at this public landmark in Fort Worth, Texas as a result of safety hazards that were ignored and unaddressed by Respondents.

ARGUMENT

On June 16, 2004, Myron Dukes, Christopher Dukes, Laurent Dukes and Juanitrice Deadmon drowned at a public landmark in Fort Worth, Texas – the Fort Worth Water Gardens. Petitioners seek the reversal of the Texas Court of Appeal's legislated no-duty opinion and a jury's determination whether construction professionals charged with inspecting the Water Gardens breached a duty of care and proximately caused the cataclysmic string of events after which four United States citizens from the state of Illinois died in Texas.

The support that follows is not jury argument. Yet, this is a jury case – innocent people died and construction professionals' negligence and breach of contractual duty, at the very least, contributed to four deaths at a public landmark. This is a jury case because the determinative question is proximate cause, not the existence of a duty to the public at large, and the jury should decide if the construction professionals bear liability. But, because of the substantive error of the lower courts in granting, affirming and ignoring the improvident summary judgment, now, in Texas, in

contrast to other jurisdictions, a review of the circumstances surrounding the existence or non-existence of a duty ***as a fact question*** or as a *mixed question of law and fact* has been foreclosed. In short shrift –Texas stands alone in holding that a construction professionals' superior knowledge of safety hazards is irrelevant in a duty analysis, as a matter of law.

A. This Case Presents Issues Important to This Court's Jurisprudence.

Petitioners' writ presents life or death questions of the public's future safety under tort and contract law, specifically, (i) may professional codes of ethics be ignored when determining a construction professional's duty, (ii) may construction professionals nefariously contract around recognized ethical responsibilities, putting citizens at perilous risks; and (iii) does a citizen of one state have a right to sue architects and engineers in another state for injuries or death arising out of an alleged breach of duty. Petitioners respectfully postulate that this Court's discretionary review will provide resolution to an important question of law as well as correct the Texas appellate court's jurisprudential errors, when the Texas Supreme Court has clearly refused to do so.

This case offers very important opportunity to irradiate confusion in Texas, and other states, as to common law duties owed by construction professionals to foreseeable plaintiffs. As public safety depends on the professional care taken by architects, engineers and contractors hired to bring public landmarks to fruition, Petitioners' case allows this Court to further the time-

honored tradition of allowing a peer group of citizens to determine whether defendants bear liability for these tragic deaths. This case also presents a classic case where a jury's determination of proximate cause will provide clarity of responsibility to construction professionals – clarity that will save lives and ensure due process under the law.

B. The Texas Court of Appeals Erred When It Refused to Find That The Issue of Respondents' Liability was a Mixed Question of Law and Fact.

Let us begin with a comment made by the American Law Institute, contained in the Restatement (Second) of Torts § 328B:

> Liability for negligence is often said to be a mixed question of law and fact. By this it is meant, not only that both the court and the jury have an important part to play in the determination of the liability, and that separate functions are assigned to each, but, further, that these functions to some extent overlap and are interdependent. In general, the court must decide questions of law, and the jury question of fact. But since a question of law may involve a ruling upon a question of fact, and a question of fact may involve the application of a rule of law, the two are often interwoven, and it becomes impossible to state the function of the court without reference to that of the jury, and vice versa. The division of functions between court and jury is in part of matter of historical origins, in part a matter of present ideas of policy as to proper procedure in the trial of a case.

Texas stands alone in holding that a construction professionals' superior knowledge of safety hazards is irrelevant in a duty analysis, as a matter of law. The appellate court hedged its holding, expositing that:

> Under Texas law, there is no binding authority to support Dukes's proposition that a court must take into consideration professional codes of ethics when conducting a duty analysis. . . . Because we have not found, nor has Dukes cited, any case law to show the contrary, we determine that professional negligence law has not yet been broadened to include the evaluation of professional codes of ethics in the determination of whether a duty is owed. Therefore, we conclude that [Respondents] had no legal duty arising from their profession as architects to report safety hazards that they might have discovered in their assessment of the Water Gardens. (Pet. App. at 12a-13a).

C. The Texas Second Court of Appeals Completely Ignored Other Legal Precedence on This Crucial Determination And Its Opinion Creates More Uncertainty.

Without considering the obvious parallels to lawyer liability, and taking up the difficult extrication of meaningful rules attendant to whether professional liability and negligence liability inhabit the same legal residence, the appellate court simplified its job and handed down "no duty." This difficult answer is simply not "no duty." As the courts struggle to determine what

weight ethics, standards or codes lend to the duty analysis, Texas has teed up the issue in two ways: first, do courts consider codified ethics at the duty stage, and two, is the answer properly published at the summary judgment stage.

As to the first query: the current legal landscape consists of miry ground needed fill – currently, the courts are in conflict as to this cracking ice layer. *See* Kimberlee K. Kovach, *The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way*, 49 S. Tex. L. Rev. 789 (2008); Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 St. Mary's L.J. 929 (2007); Fred. C. Zacharias and Bruce Green, *Permissive Rules of Professional Conduct*, 91 Minn. L. Rev. 265 (2006), *Are Evidence-Related Ethics Provisions "Law"?*, 76 Fordham L. Rev. 1315 (2007); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 Tul. L. Rev. 527 (2003); Stephen E. Kalish, *How to Encourage Lawyers to Be Ethical: Do Not Use the Ethics Code As a Basis for Regular Law Decisions*, 13 Geo. J. L. Ethics 649 (2000).

There is no dispute that public safety depends on the professional care taken by the architects, engineers and contractors hired to bring public landmarks to fruition. Texas is home to over 25 million, and over 140 million people visit Texas each year. The rendering of the Texas court of appeals opinion quite likely will be used to seek absolution of construction professionals for any non-contracted (or carved-out) responsibility to the

public for safety in design, construction or inspection of public facilities. And, if so allowed to stand, the opinion below supports this result despite the fact that specialized expertise was sought. The end result is a legal *non sequitur* – construction professional is hired to do what it is he knows how to do, but the ethics or licensure guidelines or standards have no bearing on liability resulting from his performance or lack thereof. At this point, one fact must be highlighted, one of the construction professionals contract provided that "this contract explicitly covers safety review and safety recommendations." (Pet. App. at 33a).

It shocks the conscience that, in this case, where no procedural or evidentiary error skewed the march toward justice that the construction professionals directly responsible for a safety review of a public landmark had no professional duty as it relates to public safety ***because it was not in the contract which got them paid.*** Such a result is unlegislated Texas tort reform, ineluctable results to be contracted-for exculpation of duties central to professionals' professional ethics, as well as a separation of professional liability into a stand-alone domain. This is anathema to the place in which our legal system ensconces fiduciaries and professionals, especially professionals who are mantled with the responsibility to keep our citizenry safe.

Currently postured, the construction professionals and the contracts at issue never "testified" before a jury; rather, the glimmer of a liability determination disappeared on summary judgment. As noted above, the Texas court of appeals determined that, as a question

of law, the construction professionals owed no duty to these citizens from Illinois. Duty, according to the court, was not dependent on the circumstances surrounding the construction professionals' responsibilities to the public or the public landmark's safety.

D. The Texas Court of Appeals Erred When It Refused to Find That Respondents' Liability Depends on The Facts And Foreseeability.

As noted but seemingly ignored by the appellate court, duty is "a question of law for the court to decide from the facts surrounding the occurrence in question." *See Dukes v. Philip Johnson/Alan Ritchie Architects, P.C.*, 252 S.W.3d 586, 591 (Tex. App. – Fort Worth, 2008) (citing *Timberwalk Apmts., Ptnrs., Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex. 1983); *Pichardo v. Big Diamond, Inc.*, 215 S.W.2d 497, 500-01 (Tex. App. – Fort Worth 2007, no pet.)). Further unexamined by the appellate court, but dictated by the Texas Supreme Court, foreseeability ***is a factor in determining duty***. As announced:

> In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant. ***Of all these factors, foreseeability of the risk is "the foremost and dominant consideration."***

Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 525 (Tex. 1999) (emphasis added) (citing *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987)); *see also Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 736 (Tex. 1999) (court affirmed conclusion that company selling vacuum cleaners via independent contractors owed duty to customer because company retained control over details of the contractor's work) (J. Hecht dissenting, J. Owen joining; J. Abbott dissenting, J. Owen joining); *Mission Pet. Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 710 (Tex. 2003) (citing *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 351 (Tex. 1995) ("In determining whether a legal duty exists we take into account not only the law and policies of this State, but the law of other states and the United States, and the views of respected and authoritative restatements and commentators.")

Here, the appellate court neither paid heed to the circumstances surrounding the drowning deaths, nor engaged in any analysis of the Texas Supreme Court's list of factors to be considered. Such failure is clear error, and perpendicular to other jurisdictions' treatment of this issue on summary judgment.

E. The Texas Court of Appeals Erred When It Ignored Nationally Recognized Codes of Ethics and Professional Conduct in Its Duty Analysis.

The Respondents' professions heed their unignorable responsibility for public safety, and have codified corresponding responsibility in, for instance, the American Institute of Architects (AIA) Code of Ethics and Professional Conduct, the American Society of Civil Engineers (ASCE) Code of Ethics, the National

Society of Professional Engineers Code of Ethics, and the American Society of Landscape Architects Code of Professional Ethics. By way of example, Canon 1 of the ASCE Code of Ethics provides that "Engineers shall hold paramount the safety, health and welfare of the public." Moreover, Canon 1 requires that "Engineers whose professional judgment is overruled under circumstances where the safety, health and welfare of the public are endangered . . . shall inform their clients or employers of the possible consequences." Similarly, the AIA Code of Ethics requires an architect to advise the client, refuse consent, and report a decision that will materially adversely affect public safety. *See* AIA Code of Ethics, Canon II, Rule 2.105. Clearly, these codifications take into account the foreseeability of harm to members of the public. Why then would a court of law ignore such mandates in crafting a duty analysis?

The appellate court clearly erred when it based its holding on the statement that "[u]nder Texas law, there is no binding authority to support Dukes's proposition that a court must take into consideration professional codes of ethics when conducting a duty analysis." 252 S.W.3d at 593-94. The appellate court's refusal to consider the ethical guidelines regarding public safety governing construction professionals in formulating the duty owed the public is as blatantly nonsensical as a dermatologist who – noting a cancerous lesion on the mother of the teenage patient she is seeing for acne – decides that "*First, do no harm*," does not apply to her duty as a medical professional to inform the mother.

It must be noted, that, Petitioners ***do not*** assert that professional ethics ***create*** new common law duties;

however, "questions of duty have turned on whether one party has superior knowledge of the risk, and whether a right to control the actor whose conduct precipitated the harm exists." *Graff v. Beard*, 858 S.W.2d 918, 920 (Tex. 1993); *see also* TX. JUR. NEGLIGENCE § 130 (2008). Secondly, "[d]eciding whether to impose a common-law duty involves complex social and economic policy considerations . . . When significant and diverse public policy concerns are implicated, careful consideration should be given to legislative pronouncements reflecting the adoption of a particular public policy." *Smith v. Merritt*, 940 S.W.2d 602, 604-05 (Tex. 1997) (citations omitted) (court determined not to impose a duty on a social host for a guest's intoxication because legislative enactment imposing duty on licensed servers demonstrably circumscribed creation of further common law duty).

Contrary to *Smith v. Merritt*, there is no legislative pronouncement that would serve as evidence to circumscribe common law duties for construction professionals. See TEX. OCCUPATIONS CODE ANN. tit. 6. Thus, as for construction professionals, there is no legal ***or practical*** reason to reach a narrower result – in that, professional ethics ***may*** serve as evidence of duty for construction professionals. Moreover, such is the case for lawyers, and the attorney's relationship to third parties is persuasively analogous. As noted by the Federal Circuit, "[f]rom a malpractice perspective, the apparent ethical violations alleged can serve of a breach of the duty of care owed by attorneys." *Fullerton v. Fahrenkopf*, 215 F.3d 1340 (Fed. Cir. 1999) (unpub.). Foreseeable reliance, together with "the policy of preventing future harm favors finding a duty of care"

and may bridge the gap from an attorney's duty to a client to third parties. *See also, e.g., Koehler v. Pulvers*, 614 F.Supp. 829, 849 (D.C. Cal. 1985) (attorney owed duty to non-client limited partners sued by investors in limited partnership securities because the limited partners' reliance was foreseeable, and"[t]he policy of preventing future harm favors finding a duty of care in giving this advice running directly to the limited partners, and the court finds one did." The court found that the attorney's liability under a negligent misrepresentation claim "coextensive with his liability for legal malpractice.") .

While the Texas Disciplinary Rules of Professional Conduct neither "undertake to define standards of civil liability," nor "create any presumption that a legal duty to a client has been breached;" *see* Tex. DISCIPLINARY R. PROF'L CONDUCT PREAMBLE ¶15; nonetheless, "a court may deem these rules to be an expression of public policy . . . ." *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*, 194 S.W.3d 603, 613 (Tex. App. – Houston [14th Dist.] 2006, *rev. denied* (2006)); *see also Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929 (2007); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2), at 375 (2000) (violation of a rule or statute regulating the conduct of lawyers may be considered as an aid in applying the duty of care).

Foreseeability of harm weighs heavily in favor of recognizing the duty owed by Respondents to the public, specifically the Petitioners herein. Similar to the relevance of the violation of a rule or statute governing attorneys and designed to protect someone in the plaintiff's position, ethics standards for construction

professionals carry the same relevance in this case. While:

> [f]ormerly, no cause of action could arise from a breach of contract unless there was a privity of contract between the architect and the injured plaintiff. In more modern times this doctrine has either been limited, modified, or ***completely rejected***. Architects, engineers, and contractors are now liable to persons with whom they have no privity of contract under the same principles of negligence applicable to manufacturers . . . The architect employed by the owner to prepare plans and specifications for the construction of a building is following an independent calling. He is, therefore, responsible for any negligent in the exercise of the ordinary skill of his profession which results in the erection of an unsafe structure whereby anyone on the premises is injured.

19 AM. JUR. TRIALS, *Architectural Malpractice Litigation* 231, § 14 (Vernon L. Goodin) (emphasis added). Thus, liability arises

> "if the architect could have foreseen that his failure to exercise due care would result in bodily harm to third persons . . . Irrespective of contract, the designer of a building or construction project is under a duty to make it carefully, so that third persons who should have been foreseen as probably users will not be injured."

Id.

This applies even for injuries sustained long after completion of the structure. *Id.* As noted above, Petitioners do not assert that the Respondents' failure to meet professional standards constitutes *per se* negligence; rather, Petitioners simply posit that professional ethics may play a pivotal role in defining the extent of a professional's duty – if not, what informs such scope? In this case, even if professional standards are ignored, a foreseeability review leads, guided by common sense, along the trajectory to the conclusion that the Respondents' owed a duty to the public, including a duty to not ignore the risk of harm to visitors to the Water Gardens.

In short, Texas's handling of this case is in direct contravention to how other jurisdictions handle this issue. *See e.g. Dutchmen Mfg., Inc. v. Reynolds*, 891 N.E.2d 1074 (Ind.App. Aug 11, 2008) (issue as to whether successor tenant would have acted differently had former tenant informed it of the allegedly dangerous condition of scaffolding platform was for jury where there was evidence that former tenant knew of defect and thus had duty to inspect scaffolding and inform successor tenant of any dangerous condition); *Koullias v. Farm*, 8 Misc.3d 598, 599-600, 798 N.Y.S.2d 877, 878-79 (Sup.Ct. Kings County 2005)(deeming it a jury issue whether defendant "can be chargeable with negligence for failing to foresee the potential for danger in the configuration of a curtain and a trap door that is in frequent use by delivery people."); *Tota v. Heimer*, 2006 WL 3704532 (Cal.App. 2 Dist. Dec 18, 2006) ("[i]f the circumstances permit a reasonable doubt whether the defendant's conduct violates the standard of due care, the doubt must be resolved by the jury as an issue

of fact rather than of law by the court"); *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 S.E.2d 320, 324 (N.C.1999)(issues of negligence and negligent misrepresentation in particular require highly fact-specific inquiry and therefore summary judgment is often inappropriate).

F. The Texas Court of Appeals Erred When It Refused to Consider Expert Testimony Establishing Applicable Standards for Architects and Engineers.

The appellate court incorrectly aborted this case's progression at duty although, as set forth in the Petition for Review, abundant evidence exists which tells the sad story of the respondent construction professionals' errors and omissions. In this case, the Petitioners presented additional evidence, in the form of expert testimony, establishing that architects and engineers have a professional duty to report safety hazards and correspondingly recommend reasonable repairs to protect public safety. [CR.3783-3790, App. 20; CR. 1179-1184, App. 6; CR.1185-86, App. 7]. Neither the trial court nor the appellate court considered this evidence because both rejected part and parcel any consideration whatsoever of professional ethics in their analyses.

G. This Court Should Not Permit the Texas Appellate Court to Legislate Allowing Construction Professionals to Contract Around Their Humanitarian Responsibilities For Public Health, Safety and Welfare.

The Texas appellate court erred in holding that no claim can arise for a design professional unless there is express contract language calling for a specific duty to address safety issues. This holding is in direct conflict to Texas case law establishing the mere fact that an act is done pursuant to a contract does not shield the defendant from general rules of tort liability. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304-05 (Tex. 2006). A defendant may breach duties in tort or contract alone, or both simultaneously. *See* Tx. Jur. 3d Actions§ 52 (citing cases). Rather, it is the nature of the injury that determines the existence of a tort duty. *See id.* While a contract may call for certain work to be performed, the common law implies a tort duty to the defendant to perform the work with reasonable skill and diligence so as not to injure a person by his performance. *See, e.g., M.D. Thomson v. Espey Huston & Associates, Inc.*, 899 S.W.2d 415 (Tex. App. – Austin, 1995); *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493 (Tex. 1991); *Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508 (Tex. 1947).

In this case, the appellate court mistakenly halted its negligence analysis at duty, essentially ignoring the pertinent facts and reasonable inferences that could give rise to a duty, namely the full scope of the parties' construction contracts. While "[g]enerally, whether a duty exists is a question of law to be determined by the

trail court. *Greater Houston Transp. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). On the other hand, whether facts giving rise to a duty exist, is a question for the fact finder, and usually ***cannot be determined by a motion for summary judgment***." *See Fuqua v. Taylor*, 683 S.W.2d 735, 737 (Tex. App. – Dallas 1984, writ ref'd n.r.e.).

Respondents also argued that these four Illinois citizens were not in privity to the contracts with the City of Fort Worth. Occasionally, however, parties may contract not only for their own benefit, but also for the benefit of a third-party. *See Republic Nat'l Bank v. Nat'l Bankers Life*, 427 S.W.2d 76 (Tex. App. – Dallas 1968, writ ref'd n.r.e.)." Here, there is no dispute that each Texas resident and visitor to the Water Gardens were in privity with the parties to the contracts at issue. In sum, the disputed facts and inferences to be made regarding the contracts between the City or and the construction professionals render the duty question one of law relying on fact, suitable to consideration by a jury.

One of the most egregious instances of the Court improperly applying its determination upon an triable fact is demonstrated by the Appellate Court's own statement, while weighing the City of Fort Worth's testimony regarding its reliance on the architects, stated "[A]lthough this evidence demonstrates that the City was entitled to rely on Johnson/Ritchie and Johantgen's assessment, it is not evidence that the City actually relied on their assessment." *Dukes*, 252 S.W.3d at 599. Determinations such whether the City of Fort Worth relied on the architects and engineers clearly should have been made by a jury, after hearing from the witnesses.

This case is analogous to *Kendrick v. Allright Pkg.*, 846 S.W.2d 453 (Tex. App. – San Antonio 1992), where the court reversed summary judgment on duty, reasoning that:

> "While foreseeability as an element of duty may frequently be determined as matter of law, in some instances it involves the resolution of disputed facts or inferences which are inappropriate for legal resolution.' In such cases, ***it is properly submitted to the trier of fact***."

846 S.W.2d at 458 (citations omitted) (emphasis added). The *Kendrick* holding is the appropriate one for this case – "the summary judgment evidence presents issues of fact whether the incident at hand was foreseeable . . . raising the possibility that [respondents] owed a duty as a matter of law to take steps to offer reasonable protection . . . ." *Id.*

CONCLUSION

This is not a duty case. This gravamen is a *Palsgraf* issue. It is also a "breach" issue as it relates to the contracts at issue. On review, this Court may clarify Texas jurisprudence and determine whether the appellate court erred by exiting too early, failing to arrive at the correct stop, the platform where a jury decides whether Respondents proximately caused these tragic, and preventable, deaths.

For all of the foregoing reasons, the Texas Second Court of Appeals' decision was nothing short of a

complete miscarriage of justice in this case, impacting not only families of the decedents who drowned as a result of the conduct and omission of the construction professionals, but also all citizens and visitors who frequent public facilities expecting some degree of safety.

Petitioners therefore respectfully request this Court to grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS, FORT WORTH DATED MARCH 27, 2008

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-07-095-CV

STEPHANIE DUKES, INDIVIDUALLY, STEPHANIE DUKES, AS INDEPENDENT EXECUTOR OF THE ESTATE OF MYRON DUKES, DECEASED, STEPHANIE DUKES, AS INDEPENDENT EXECUTOR OF THE ESTATE OF CHRISTOPHER DUKES, DECEASED, STEPHANIE DUKES, AS INDEPENDENT EXECUTOR OF THE ESTATE OF LAUREN DUKES, DECEASED, LOTTIE JAQUESZIAN DUKES, INDIVIDUALLY, MYRON JAMAL DUKES, INDIVIDUALLY, BY HIS MOTHER AND NEXT FRIEND, GLENDA MAGHETT, ALEXANDRA DEADMON, INDIVIDUALLY, FRUENZE DEADMON, INDIVIDUALLY, ALEXANDRA DEADMON AND FRUENZE DEADMON, AS INDEPENDENT CO-EXECUTORS OF THE ESTATE OF JUANITRICE DEADMON, DECEASED, FRUENZE DEADMON, JR., INDIVIDUALLY, BY HIS PARENTS AND NEXT FRIENDS, ALEXANDRA DEADMON AND FRUENZE DEADMON, CAMERON DEADMON, INDIVIDUALLY, BY HIS PARENTS AND NEXT FRIENDS, ALEXANDRA DEADMON AND FRUENZE DEADMON, GEMMIA DEADMON,

Appendix A

INDIVIDUALLY, BY HER PARENTS AND NEXT FRIENDS, ALEXANDRA DEADMON AND FRUENZE DEADMON

APPELLANTS

V.

PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS, P.C., PHILIP JOHNSON, RITCHIE & FIORE ARCHITECTS, P.C., ALAN RITCHIE/DAVID FIORE ARCHITECTS, P.C., PHILIP JOHNSON, ALAN RITCHIE, DAVID FIORE, PETER JOHANTGEN, PETER JOHANTGEN CONSULTING, INC., HUITT-ZOLLARS, INC., EMILE KELLER, AND AUSTIN COMMERCIAL, INC.

APPELLEES

FROM THE 141ST DISTRICT COURT
OF TARRANT COUNTY

OPINION

I. Introduction

In eleven issues, Stephanie Dukes, Individually; Stephanie Dukes, as Independent Executor of the Estate of Myron Dukes, Deceased; Stephanie Dukes, as Independent Executor of the Estate of Christopher Dukes; Stephanie Dukes, as Independent Executor of the Estate of Lauren Dukes, Deceased; Lottie

Jaqueszian Dukes, Individually; Myron Jamal Dukes, Individually, by his Mother and Next Friend, Glenda Maghett; Alexandra Deadmon, Individually; Fruenze Deadmon, Individually; Alexandra Deadmon and Fruenze Deadmon, as Independent Co-Executors of the Estate of Juanitrice Deadmon, Deceased; Fruenze Deadmon, Jr., Individually, by his Parents and Next Friends, Alexandra Deadmon and Fruenze Deadmon; Cameron Deadmon, Individually, by his Parents and Next Friends, Alexandra Deadmon and Fruenze Deadmon; Gemmia Deadmon, Individually, by her Parents and Next Friends, Alexandra Deadmon and Fruenze Deadmon, (hereinafter "Dukes") appeals the trial court's granting of summary judgment to Philip Johnson/Alan Ritchie Architects, P.C., Philip Johnson, Ritchie & Fiore Architects, P.C., David G. Whitney and Alan Ritchie, Alan Ritchie/David Fiore Architects, P.C. and David Fiore (collectively "Johnson/Ritchie"); Huitt-Zollars, Inc. and Emile Keller (collectively "Huitt/Keller"); Peter Johantgen and Peter Johantgen Consulting, Inc. (collectively "Johantgen"); and Austin Commercial, Inc. (hereafter "Austin").

II. Factual History

This case involves the tragic drowning deaths of Myron Dukes, Christopher Dukes, Lauren Dukes, and Juanitrice Deadmon on June 16, 2004 in the Fort Worth Water Gardens. No one knows exactly how Lauren and Juanitrice initially entered the Active Water Pool. Lauren was reportedly the first to enter the water, and Juanitrice reportedly tried to help her out and either

fell in or jumped in the pool. Both Myron and Christopher Dukes drowned after entering the Active Water Pool in an effort to save the girls.

Since 1974, the Fort Worth Water Gardens, an outdoor urban park and water sculpture, have been an architectural favorite and a source of pride for the City of Fort Worth ("City"). The City has owned and controlled the Water Gardens since the 1970s. Prior to this accident, there had been no previous drowning deaths in the Water Gardens.

The Water Gardens were originally designed by architects Philip Johnson and John Burgee and were not intended for swimming. In the 1990s, the City determined that it would engage in a restoration and renovation of the Water Gardens in conjunction with the Fort Worth Convention Center Renovation Project ("Project"). The City contracted with Huitt/Keller from 1994-2000 to perform an architectural assessment of the Water Gardens. In 1999, the City also contracted with Johnson/Ritchie and Johantgen as consulting architects. In 2001 through 2002, the City contracted with Austin to act as a project manager for the Project, adjacent to the Water Gardens.

Shortly after the accident, Dukes filed suit against the City and a number of architectural firms and engineering firms, as well as individual architects, engineers, and contractors. Dukes asserted wrongful death, survival, and bystander claims against multiple defendants. Dukes settled with the City in 2005.

The remaining Appellees are comprised of architectural firms, engineering firms, and individual architects and engineers who have been involved over the years with the design or restoration of the Water Gardens.

III. Procedural Background

All of the nonsettling defendants in the underlying case, including those involved in this appeal, filed motions for summary judgment. Each of the defendants asserted that they owed no duty to the Dukes. In addition, Johnson/Ritchie asserted that there was no proximate cause between their actions and the incident in question and that the Dukes's claims were barred by limitations. On April 10, 2007, the trial court granted summary judgment to all of the aforementioned parties without specifying the grounds therefor. This appeal followed.

IV. Standard of Review

In a summary judgment case, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX.R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex.2002); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979). The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. *Sw. Elec. Power Co.*, 73 S.W.3d at 215.

When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett,* 164 S.W.3d 656, 661 (Tex.2005). Evidence that favors the movant's position will not be considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.,* 391 S.W.2d 41, 47 (Tex.1965). But we must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. *See Wal-Mart Stores, Inc. v. Spates,* 186 S.W.3d 566, 568 (Tex.2006); *City of Keller v. Wilson,* 168 S.W.3d 802, 822-24 (Tex.2005).

The summary judgment will be affirmed only if the record establishes that the movant has conclusively proved all essential elements of the movant's cause of action or defense as a matter of law. *Clear Creek Basin,* 589 S.W.2d at 678.

A defendant who conclusively negates at least one essential element of a cause of action is entitled to summary judgment on that claim. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason,* 143 S.W.3d 794, 798 (Tex.2004). Once the defendant produces sufficient evidence to establish the right to summary judgment, the burden shifts to the plaintiff to come forward with competent controverting evidence raising a genuine issue of material fact with regard to the element challenged by the defendant. *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex.1995).

When a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex.2003); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex.1995).

V. Duty

The primary question in this case is whether Johnson/Ritchie, Johantgen, Huitt/Keller, and Austin owed a duty to the decedents.

A. General Negligence Law

The common law doctrine of negligence consists of three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990). The threshold inquiry in a negligence case is duty. *Id.* The plaintiff must establish both the existence and violation of a duty owed to the plaintiff by the defendant to establish liability in tort. *Id.* Whether a duty exists is a question of law for the court to decide from the facts surrounding the occurrence in question. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex.1998); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 312 (Tex.1983); *Pichardo v. Big Diamond, Inc.*, 215 S.W.3d 497, 500-01 (Tex.App.—Fort Worth 2007, no pet.).

B. Premises Liability Law

Premises liability is a special form of negligence. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex.2005). A premises defect cause of action exists if a person is injured as a result of a condition of the premises. *City of San Antonio v. Estrada*, 219 S.W.3d 28, 32 (Tex.App.-San Antonio 2006, no pet.). Duty is still a threshold inquiry in a premises liability case, and the duty owed to the claimant depends on the status of a claimant at the time that the incident giving rise to the lawsuit occurred. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex.1995); *Urena*, 162 S.W.3d at 550. This status can be one of an invitee, licensee, or trespasser.[1] *Almanza v. Navar*, 225 S.W.3d 14, 20 (Tex.App.—El Paso 2005, no pet.).

Whether a duty exists to keep the premises in a safe condition is a question of law for the court to decide based on the facts and circumstances. *Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 654 (Tex.App.—Fort Worth 2004, no pet.). If no duty exists, then no legal liability for a premises liability claim can arise. *Strunk v. Belt Line Rd. Realty Co.*, 225 S.W.3d 91, 99 (Tex.App.—El Paso 2005, no pet.).

A defendant, who was the owner or occupier of the premises at the time of the injury, must have had control of the premises to be liable under premises liability.

1. It is undisputed that the four individuals, whose deaths were the genesis of this case, were invitees.

Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 324 (Tex.1993). Therefore, a plaintiff must prove that the defendant had control over and responsibility for the premises before a duty can be imposed on the defendant. *See County of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex.2002). The control that the defendant had over the premises must relate to the condition or activity that caused the injury. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527-28 (Tex.1997).

Ordinarily a person who does not own the real property must assume control over and responsibility for the premises before there will be liability for a dangerous condition existing on the real property. *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex.1986); *see, e.g., Alexander*, 868 S.W.2d at 324 (stating that a lessee is responsible for those areas adjacent to the demised premises which it actually controls). However, a private person who has created the dangerous condition or who has agreed to make safe a known, dangerous condition may be liable even though not in control of the premises at the time of injury. *Page*, 701 S.W.2d at 835.

VI. Johnson/Ritchie and Johantgen

In issues one through four, Dukes asserts that the trial court erred by granting summary judgment in favor of Johnson/Ritchie and Johantgen because the evidence demonstrated that there were direct contradictions between the testimony of Ritchie, Johantgen, and City Supervisor, Richard Zavala; that

Johnson/Ritchie and Johantgen owed duties of care to the public; that Johnson/Ritchie and Johantgen had actual knowledge of the hazard at the Active Water Pool; and that their alleged breach of duties contributed to cause the deaths of the decedents.[2]

A. Applicable Facts

The Water Gardens were originally designed by architects Philip Johnson and John Burgee in 1974. In 1997, the Water Gardens had been in operation for twenty-three years and was in need of repair and restoration. The City considered changing the south wall of the Water Gardens and sought the input of Johnson/Ritchie to help preserve the original design. In December 1997, Ritchie was invited to Fort Worth to review the proposed changes. Subsequently, Richard

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2. We will collectively refer to Appellees Philip Johnson/Alan Ritchie Architects, P.C., Philip Johnson, Ritchie & Fiore Architects, P.C., Alan Ritchie, individually, and David. G. Whitney, who is the executor of Philip Johnson's estate as "Johnson/Ritchie" for the sake of clarity. Similarly, although Peter Johantgen and Peter Johantgen Consulting, Inc. are separate parties, we will collectively refer to them as "Johantgen."

We note that Dukes refers to all of the aforementioned parties as the "New York Architects" in issues one through four. However, Peter Johantgen and Peter Johantgen Consulting, Inc., together, are represented by different counsel than the other parties in this section, and filed their own, distinct motions for summary judgment. For that reason, we will *not* collectively refer to these parties as the "New York Architects"; however, we will evaluate Dukes's assertions as to Johnson/Ritchie and Johantgen at the same time.

Zavala, director of the City's Parks and Community Services Department, sent a letter on December 9, 1997, to several individuals, including Johnson/Ritchie, that summarized the meeting between Ritchie and the City regarding the proposed changes to the Water Gardens. The letter considered possible design activity for the Water Gardens if a capital improvement was approved by voters the following year. The letter stated that Johnson/Ritchie would provide a "comprehensive review" of the Water Gardens, including an assessment of "the overall condition[s and] various systems, i.e. lighting, mechanical, electrical, plumbing, etc."

It was not until two years later, on April 22, 1999, that the City contracted with Johnson/Ritchie to review the Water Garden's existing conditions and determine whether the park's features were in compliance with the Americans with Disabilities Act ("ADA"). Subsequently, Johnson/Ritchie hired Peter Johantgen to assist in performing the 1999 review of the Water Gardens.[3] There was no written contract between Johantgen and Johnson/Ritchie. According to his affidavit testimony, Johantgen's scope of work was to include a "limited visual inspection of the Water Gardens to document the existing conditions of the site as it relates to repair and restoration of the site to its original condition along with possible ADA issues."

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3. Johantgen had previously worked for Philip Johnson, Ritchie & Fiore Architects, P.C. from 1992-1997. Mr. Fiore resigned in 1996, and thereafter the firm changed its name to Philip Johnson/Alan Ritchie Architects, P.C. ("Johnson/Richie").

Johantgen performed a visual inspection of the Water Gardens on July 25-27, 1999. Based on Johantgen's review, Johnson/Ritchie submitted a conditions survey to the City in October 1999. The City never retained Johnson/Ritchie or Johantgen to design or implement any of the matters identified in the conditions survey.

B. Applicability of Professional Codes of Ethics in a Duty Analysis

The primary question is whether Johnson/Ritchie and Johantgen owed a duty to the decedents. Dukes first contends that Johnson/Ritchie and Johantgen owed a duty to the decedents because, as professionals, they were under the ethical obligation to report any unsafe or hazardous conditions that they observed during their review of the Water Gardens.

Under Texas law, there is no binding authority to support Dukes's proposition that a court must take into consideration professional codes of ethics when conducting a duty analysis. The only case that supports Dukes's position is the concurring opinion of *Winters v. Houston Chronicle Publishing Co.*, in which Justice Doggett noted that

> [b]oth civil and criminal statutes reflect myriad expressions of the public policy to encourage the reporting and correction of activities harmful to our citizenry. This principle is . . . applicable to licensed

> professionals—physicians, attorneys, and others—which *impose upon them a duty to report* unethical conduct in their profession[.]

795 S.W.2d 723, 731-32 (Tex.1990) (Doggett, J., concurring) (emphasis added). However, the Texas Supreme Court has more recently observed, albeit in a footnote, that the "Rules [of Professional Conduct] do not define standards of civil liability of lawyers for professional conduct." *Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 159 n. 2 (Tex.2004). Because we have not found, nor has Dukes cited, any case law to show the contrary, we determine that professional negligence law has not yet been broadened to include the evaluation of professional codes of ethics in the determination of whether a duty is owed. *See id.* Therefore, we conclude that Johnson/Ritchie and Johantgen had no legal duty arising from their profession as architects to report safety hazards that they may have discovered in their assessment of the Water Gardens.

Dukes next asserts that Johnson/Ritchie and Johantgen owed a duty of care arising from Johnson/Ritchie's 1999 contractual relationship with the City.[4]

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4. Although Dukes specifically contends that a duty arose out of Johnson/Ritchie's 1999 contract with the City, throughout their brief Dukes also argues that the 1999 contract is only one of *two* documents that defines the scope of the architects' services, the other document being a 1997 letter from Richard Zavala, Director of the Parks and Community Services

(Cont'd)

Appendix A

A contract for professional services gives rise to a duty by the professional to exercise the degree of care, skill, and competence that reasonably competent members of the profession would exercise under similar circumstances. *Averitt v. PriceWaterhouseCoopers L.L.P.*, 89 S.W.3d 330, 334 (Tex.App.—Fort Worth 2002, no pet.). In contracting for personal services, an architect's or an engineer's duty depends on the particular agreement entered into with his employer. *I.O.I. Sys., Inc. v. City of Cleveland, Tex.*, 615 S.W.2d 786, 790 (Tex.App.—Houston [1st Dist.] 1980, writ. ref'd

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(Cont'd)

Department, to John Robinson, Executive Director of the Amon G. Carter Foundation. The 1997 letter included a summary of the meeting that took place between the department's staff, Ritchie, and Emile Keller, who is Vice-President of Appellee Huitt/Keller, where they discussed possible design changes to the Water Gardens that would be effectuated if a capital improvement was approved by voters the following year.

In our review of the scope of Johnson/Ritchie's and Johantgen's duties, we will not examine the 1997 letter because it does not constitute a valid contract and, therefore, does not define the scope of responsibility. *See Hubbard v. Shankle*, 138 S.W.3d 474, 481 (Tex.App.—Fort Worth 2004, pet. denied) (holding that to constitute a valid contract, there must be an offer, acceptance, meeting of the minds, each party's consent to the terms, execution, and delivery of the contract with the intent that it be mutual and binding). Indeed, Richard Zavala agreed that the 1997 letter was not the contract with Johnson/Ritchie; instead, the actual contract was negotiated and signed in the 1999 agreement. Thus, in evaluating whether a contractual duty existed, we look only to the April 22, 1999 agreement among the parties.

n.r.e.). An engineer or an architect must use the skill and care in the performance of his duties commensurate with the requirements of his profession and is only liable for a failure to exercise reasonable care and skill commensurate with those requirements. *Id.*

In this case, we look only to the April 22, 1999 contractual agreement to determine whether Johnson/Ritchie and Johantgen owed a duty to the decedents.[5] The scope of Johnson/Ritchie's duty is determined by this contract. *See id.*(holding that an architect's duty depends on the particular agreement entered into with his employer).

After reviewing the contract, we determine that contrary to Dukes's assertion, the contract did not require Johnson/Ritchie to address safety issues. Although Dukes contends that the 1999 agreement was a "comprehensive review," thus making a safety review necessarily a part of Johnson/Ritchie's responsibilities, our review of the agreement shows that it merely stated that Johnson/Ritchie would provide "a review of existing conditions," including the "pavement, steps, and railings"; the "pools' surfaces, plumbing and lighting"; the "changes to the original Water Gardens for compliance with the ADA"; and development of "appropriate repair options and establishing of repair

5. It is undisputed that the April 22, 1999 agreement constituted a valid contract between the City and Johnson/Ritchie.

priorities."[6] Nowhere does the contract specify that Johnson/Ritchie had any contractual obligation to report or make safe any hazards that they may have detected in the Water Gardens. Therefore, because Johnson/Ritchie's duty depends on the contract they entered into with the City, and because there is no evidence that the contract required Johnson/Ritchie to report or make safe any hazards detected, we determine that Dukes's assertion that Johnson/Ritchie owed a duty to the decedents arising from Johnson/Ritchie's contractual relationship with the City is without merit. *See, e.g., Entex, A Div. of Noram Energy Corp. v. Gonzalez*, 94 S.W.3d 1, 11 (Tex.App.—Houston [14th Dist.] 2002, pet. denied) (holding that gas provider did not have a negligence duty arising from its contractual relationship because the contract only required that the gas provider change the meter and did not require them to inspect, repair, or warn about the water heater).

Similarly, the summary judgment evidence shows that the scope of Johantgen's duties did not include a safety review. Johantgen's duty was defined by the scope of his agreement with Johnson/Ritchie to act as a

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6. The 1997 letter summarizing the meeting between Ritchie, Zavala, and others included the words "comprehensive review." However, the 1999 contract contains no such language. Although Dukes attempts to intermingle the language of the two documents to provide support for their contention that the scope of Johnson/Ritchie's review necessarily included a safety analysis, we have already stated that we will only examine the 1999 contractual agreement to determine the scope of Johnson/Ritchie's responsibilities.

consultant pursuant to Johnson/Ritchie's 1999 contract with the City to provide a review and assessment of the Water Gardens. *See I.O.I. Sys. Inc.*, 615 S.W.2d at 790 (holding that in contracting for personal services, an architect's duty depends on the particular agreement entered into with his employer). The summary judgment evidence shows that Johantgen was asked by Johnson/Ritchie to do a limited visual inspection of the Water Gardens to document the existing conditions as it related to repair and restoration of the site to its original condition, along with possible ADA issues, and that the scope of his work did not include a review of the safety issues or hazards at the site. Dukes has not presented any evidence showing that the scope of Johantgen's work included a safety review. Therefore, because Dukes has failed to present any evidence showing otherwise, we hold that Johantgen owed no duty to the decedents to report any safety hazards observed during Johantgen's 1999 review of the Water Gardens.

C. Premises Liability

Dukes next argues that Johnson/Ritchie and Johantgen owed a duty under premises liability law. Dukes first contends that Johnson/Ritchie and Johantgen owed a duty because they recognized that there were hazards in the Water Gardens and that drowning was a foreseeable result of such hazards. In their effort to show that a court may consider the

forseeability[7] of harm in determining whether the defendant exercised the duty of reasonable care, Dukes cites *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292 (Tex.1983). However, the analysis in that case deals exclusively with the duty that an occupier of premises owes to invitees. While there is no dispute that the decedents were invitees, there is also no dispute that the City was the owner and occupier in exclusive control of the Water Gardens. Indeed, aside from Johantgen's 1999 walk-through of the Water Gardens, Johnson/Ritchie and Johantgen never conducted any work at the Water Gardens, nor did the City ever contact them to implement any of the recommendations contained in the conditions survey. Nor has Dukes presented any evidence indicating that Johnson/Ritchie or Johantgen had exclusive control over the Water Gardens. Therefore, whether Johnson/Ritchie and Johantgen exercised reasonable care to the decedents is of no consequence simply because Johnson/Ritchie and Johantgen were neither the owners of the Water Gardens, nor were they an occupier in exclusive control of the premises. *See Alexander*, 868 S.W.2d at 324; *Page*, 701 S.W.2d at 835. Accordingly, no duty of reasonable care may be imposed upon Johnson/Ritchie and Johantgen under general premises liability law. *See Alexander*, 868 S.W.2d at 324; *Page*, 701 S.W.2d at 835.

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7. As pointed out by Johantgen, foreseeability is part of causation, and his motion for summary judgment was based on no duty, not a lack of causation.

Appendix A

If the general rule of premises liability is inapplicable, a party may be held liable under a premises liability analysis only if the party has agreed to make safe a known, dangerous condition on the premises and failed to do so or if the party has created the dangerous condition. *See Page*, 701 S.W.2d at 835.

To determine whether either exception applies, we examine the summary judgment evidence. However, even viewing the evidence in the light most favorable to Dukes, we determine that neither Johnson/Ritchie nor Johantgen ever expressly or impliedly agreed to make safe a known, dangerous condition, nor did they create the dangerous condition. *See id.* (evaluating whether the City of Denton ever expressly or impliedly contracted to remedy any dangerous condition on the property). Johnson/Ritchie's contract with the City required them to provide only a review of the Water Gardens' existing conditions so that the City could repair and restore the Water Gardens consistent with the original design and to comply with the ADA. The contract imposed no responsibility upon Johnson/Ritchie to remedy the problems that they discovered in the course of their review. Thus, the contract itself demonstrates that Johnson/Ritchie never expressly agreed to make safe a known, dangerous condition, and Dukes has not presented any competent evidence that would raise a genuine issue of material fact showing otherwise. *See Centeq Realty, Inc.*, 899 S.W.2d at 197. Nor has Dukes presented any evidence raising a genuine issue of material fact that Johnson/Ritchie or Johantgen impliedly agreed to remedy a known, dangerous condition or that they created the condition.

Furthermore, Dukes's attempt to analogize this case to *Crown Derrick Erectors, Inc. v. Dew,* 117 S.W.3d 526 (Tex.App.—Beaumont 2003), *rev'd on other grounds,* 208 S.W.3d 448 (Tex.2006) is misplaced. In that case, Crown Derrick left a hole in an elevated rig walkway unguarded except for a small rope barrier. *Id.* A worker subsequently fell through the hole to his death. *Id.* The court imposed liability only because Crown Derrick was "acting to correct a danger it agreed to correct and that arose out of its own work." Dukes argues that just as liability was imposed on Crown Derrick because it had undertaken to erect a barrier to protect a dangerous area on its work site, liability should also be imposed in this case because Johnson/Ritchie and Johantgen "took half-steps to address the potential hazard" by reporting their observation of algae growth in the 1999 report.[8] However, the imposition of liability upon Crown Derrick turns on the fact that it was "acting to correct a danger it *agreed to correct* and that arose out of its own work." *See id.* at 532 (emphasis added). As we previously discussed, Dukes has not raised a genuine issue of material fact that Johnson/Ritchie or Johantgen ever expressly or impliedly agreed to correct any problems discovered in the course of their review. Thus, they had no duty to correct any potential hazard that they observed.

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8. Dukes asserts that Johantgen observed a hazard in the form of "algae or growth or fungus or something like this" on the stepping stones around the Active Water Pool that created a slipping risk for falls into the pool and that liability should be imposed because "the architect's report only made an obscure reference to cleaning of organic deposits [ ] and [said] nothing about a drowning hazard."

After reviewing the evidence, we determine that Dukes has failed to raise a genuine issue of material fact that either Johnson/Ritchie or Johantgen agreed to make safe a known, dangerous condition and failed to do so or that they created the hazardous condition. *See Page*, 701 S.W.2d at 835. Therefore, we determine that no duty was imposed on Johnson/Ritchie and Johantgen under premises liability law.

D. Voluntary Undertaking of a Duty

We now turn to Dukes's third proposed source of a negligence duty, an undertaking theory. Dukes contends that Johnson/Ritchie's 1999 agreement "clearly state[s] that the respective assessments were to cover all areas of the Water Gardens" and that a "duty may be established by a showing that [Johnson/Ritchie and Johantgen] undertook inspection of the entire park."

The Texas Supreme Court has stated that "one who voluntarily undertakes an affirmative course of action for the benefit of another has a duty to exercise reasonable care that the other's person or property will not be injured thereby." *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 119 (Tex.1976); *Tex. Woman's Univ. v. Methodist Hosp.*, 221 S.W.3d 267, 283-84 (Tex.App.—Houston [1st Dist.] 2006, no pet.). If one undertakes to make the premises safe for others, he or she owes a duty to use due care to make the premises safe. *Crooks v. M1 Real Estate Partners, Ltd.*, 238 S.W.3d 474, 489-90 (Tex.App.—Dallas 2007, pet. filed). "Due care" is that degree of care which a person of ordinary prudence

would exercise under the same or similar circumstances. *Id.* The court in *Colonial Savings* cited section 323 of the Second Restatement of Torts, which provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

See Colonial Sav. Ass'n, 544 S.W.2d at 120. Thus, to establish a negligent undertaking, a plaintiff must show: (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (3) the plaintiff relied upon the defendant's performance; or (4) the defendant's performance increased the plaintiff's risk of harm. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 839 (Tex.2000); *Crooks*, 238 S.W.3d at 489-90.

In their attempt to persuade this court that Johnson/Ritchie and Johantgen undertook a duty through their inspection of the Water Gardens, Dukes cites *Torrington Co.*, 46 S.W.3d at 839. In that case, Torrington was sued

after a Navy helicopter crashed and killed two Marines. *Id.* Torrington's subsidiary had manufactured the bearing that had failed in the helicopter. *Id.* After an earlier crash of a civilian helicopter with a similar bearing, Torrington had written a letter to Bell Helicopter stating that it was "most anxious to participate in any evaluation you are currently performing." *Id.* The letter also stated that Torrington intended to "continue to actively participate with the [National Transportation Safety Board] in their investigation." *Id.* The Texas Supreme Court held that Torrington's letter to Bell Helicopter was an undertaking of some type. However, the facts about the scope of the assumed duty were in dispute, and therefore, the issue should have been determined by the jury.[9] *Id.*

Although Dukes cites *Torrington* to support their argument that Johnson/Ritchie assumed a duty by undertaking the inspection of the Water Gardens, we determine that such reliance is misplaced. Whereas the court in *Torrington* was able to specifically point to Torrington's letter to Bell Helicopter as an undertaking in which Torrington voluntarily broadened its duty,

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9. The court held that the jury should have been instructed that Torrington was negligent only if (1) Torrington undertook to perform services that it knew or should have known were necessary for the plaintiffs' protection, (2) Torrington failed to exercise reasonable care in performing those services, and either (3) the Navy relied upon Torrington's performance, or (4) Torrington's performance increased the plaintiffs' risk of harm. *Id.* at 838-39.

Dukes has failed to demonstrate an affirmative act undertaken by Johnson/Ritchie or Johantgen that broadened the scope of their duty. Although Dukes argues that Johnson/Ritchie and Johantgen's inspection of the Water Gardens was a voluntary undertaking, they have failed to explain how such action is anything more than the architects' complying with their existing contractual obligation. We have already determined that Johnson/Ritchie's contractual agreement with the City defined the scope of their duty and that such a duty did not include a safety assessment.[10] To hold that Johnson/Ritchie and Johantgen voluntarily assumed a duty simply by performing an assessment of the Water Gardens, an action that was in strict compliance with their contractual obligation, does not comport with the general rule that an architect's duty depends on the particular agreement entered into with his employer. *See I.O.I. Sys., Inc.*, 615 S.W.2d at 790. We will not disregard the plain language of the contract that clearly defines the scope of the architects' duty merely because Dukes argues that the voluntary undertaking doctrine applies.

Moreover, even if Dukes presented evidence that Johnson/Ritchie and Johantgen undertook a duty, which

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10. Dukes contends that "factual disputes regarding the extent and scope of the undertaking by [Johnson/Ritchie and Johantgen] . . . at the Water Gardens should be submitted to a jury for a factual finding. The issue cannot be decided as a matter of law." However, Dukes fails to explain what the factual disputes are regarding the purported undertaking that Johnson/Ritchie and Johantgen voluntarily assumed.

Dukes has not, liability still would not be imposed upon Johnson/Ritchie and Johantgen under the voluntary undertaking theory because Dukes has failed to present a genuine issue of material fact to show that the City relied on Johnson/Ritchie and Johantgen's 1999 assessment of the Water Gardens or shown that their inspection increased the risk of harm. *See Entex,* 94 S.W.3d at 10.

Dukes attempts to show that the City relied on Johnson/Ritchie and Johantgen's work because both Johnson/Ritchie and Johantgen conceded that it was appropriate for the City to rely on their work. Specifically, Dukes points to the following affidavit testimony to argue that the City relied upon their professional expertise:

> Q: (By Mr. Ford) But all I'm saying is the City has the right to rely on [architects and contractors and engineers whom the City has paid millions of dollars], true?
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> . . . .
>
> A: (By Mr. Ritchie) Well, yeah, but that's our responsibility.
>
> . . . .
>
> Q: (By Mr. Ford) . . . [W]ould you agree that it would be appropriate for . . . [the City] to

> rely upon Phillip Johnson, Alan Ritchie Architects to perform that function of setting priorities?
>
> . . . .
>
> A: (By Mr. Ritchie) Given the criteria that you've stated, it would stand to reason that, yes.

Although this evidence demonstrates that the City was entitled to rely on Johnson/Ritchie and Johantgen's assessment, it is not evidence that the City actually relied on their assessment. In contrast, the summary judgment evidence shows that the City never contacted Johnson/Ritchie or Johantgen regarding any of the changes they suggested, nor did the City implement any of the suggestions or modifications contained in the 1999 conditions survey. Even viewing this evidence in the light most favorable to Dukes, it does not establish reliance, merely because Dukes has shown that the City could have relied on the architect's review does not mean that they actually did rely on it. Nor has Dukes presented a genuine issue of material fact to show that Johnson/Ritchie and Johantgen's inspection of the Water Gardens increased the risk of harm. Dukes has not presented any evidence to show that any risk of harm from the Water Gardens, and specifically the Active Water Pool, was greater as a result of Johnson/Ritchie and Johantgen's 1999 assessment than it had been before it. *See Entex*, 94 S.W.3d at 10 (holding that in determining whether there is an increased risk of harm,

we compare the risk of harm resulting from the negligence to that existing before the undertaking). Although Johnson/Ritchie and Johantgen included their observation that algae or some other organic growth was detected on the concrete surfaces in the conditions survey, Dukes has not shown how the risk of harm was greater because of their observation. Nor has Dukes presented any evidence to show that the risk of harm was greater after their review than it was before the City contracted with them.

Because Dukes has failed to present competent, controverting evidence raising a genuine issue of material fact that Johnson/Ritchie and Johantgen owed a duty to the decedents, we determine that the voluntary undertaking rule is inapplicable. Therefore, whether Johnson/Ritchie and Johantgen owed a duty is a question of law that was properly determined by the trial court. *See Timberwalk Apartments Partners, Inc.*, 972 S.W.2d at 756.

E. Conclusion

Thus, based on the summary judgment evidence, we determine that Dukes has failed to present a genuine issue of material fact that Johnson/Ritchie or Johantgen owed or assumed any duty to the decedents. *See Centeq Realty, Inc.*, 899 S.W.2d at 197. Thus, the summary judgment evidence conclusively proves, as a matter of law, that Johnson/Ritchie and Johantgen's work on the Water Gardens restoration project gave rise to no legal duty. Accordingly, we overrule Dukes's issues

one through four and affirm the trial court's summary judgment as to Johnson/Ritchie and Johantgen.

VII. Huitt/Keller

In issues five through eight, Dukes argues that the trial court erred by granting summary judgment to Huitt/Keller because the evidence demonstrated that there were direct contradictions between testimony of Emile Keller[11] and City Supervisor, Richard Zavala; that Huitt/Keller owed duties of care to the public; that Huitt/Keller failed to safeguard dangers; and where Huitt/Keller had actual knowledge of the hazard at the Active Water Pool that contributed to cause the deaths of the decedents.

A. Applicable Facts

On January 7, 1994, the City contracted with Huitt/Keller to perform an architectural assessment of the Water Gardens. The contract required Huitt/Keller to provide an assessment of the Water Gardens and provide the City with a report based on their findings. The scope of services included an assessment of the existing civil, structural, mechanical, and electrical engineering services.[12] As part of their contractual

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11. Emile Keller is the Vice-President of Huitt-Zollars (collectively "Huitt/Keller").

12. Huitt/Keller was to "conduct a detailed investigation of the site, . . . document all problem areas" that were "contributing to multiple systems deterioration," and recommend solutions.

agreement, Huitt/Keller was to submit both a 30% preliminary review as well as a final report after all reviews of the Water Garden had been completed.[13] The 30% review was submitted on March 7, 1994, and the final report was delivered on November 1, 1994.

On April 26, 1995, the City again contracted with Huitt/Keller to perform an assessment of the Water Gardens. The scope of this assessment greatly differed from the 1994 contract, in that under the terms of the 1995 contract, Huitt/Keller was to focus solely on designs for the construction of ADA improvements. The 1995 contract describing Huitt/Keller's services stated that Huitt/Keller was to

> [p]erform architectural and engineering design services for the construction of ADA improvements to the Fort Worth Water Gardens, to include ramps, a viewing platform, safety curbs at the Cascade Pool, and handrails for stairways leading to the Quiet Pool.

The 1995 assessment did not involve a review of the Active Water Pool. On October 13, 1995, Huitt/Keller

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13. The "30% Preliminary Review" was given to the City when Huitt/Keller was one-third of the way through the project. According to Keller's deposition testimony, the purpose of the review was "[t]o get feedback from the City on the direction in which [Huitt/Keller] [was] going and [to] get comments from [the City]."

delivered its report assessing necessary ADA improvements.

On May 5, 2000, the City again contracted with Huitt/Keller to participate in a workshop to review planning of future development around the Water Gardens. The work Huitt/Keller provided in this instance was very limited in scope and was only for the participation in a general study regarding future development.

B. Applicability of Professional Codes of Ethics in a Duty Analysis

Dukes argues that because Huitt/Keller had actual knowledge of the hazard at the mouth of the Active Water Pool in 1994, and yet failed to include such knowledge in their final report, they should be liable.[14] Specifically, Dukes argues that such liability may be imposed because professional codes of ethics require a professional to report conditions which could endanger public safety and health.

As we have already determined, under Texas law, there is no binding authority to support the Dukes's proposition that a court must take into consideration professional codes of ethics when determining whether

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14. Huitt/Keller's 1994 final report stated that "[the Active Water Pool] is the most prominent, as well as the most hazardous. . . ." Emile Keller acknowledged that the unprotected edges at the stepping stones adjacent to the water falling into the Active Water Pool were also potentially hazardous.

a duty is owed. *See, e.g., Joe,* 145 S.W.3d at 159 n. 2 (stating that the Texas Rules [of Professional Conduct] do not define standards of civil liability of lawyers for professional conduct). We will not expand the legal exposure of design professionals beyond their contractual undertaking, and therefore we determine that no liability may be imposed upon Huitt/Keller merely because of their role as professional architects.

C. Premises Liability

Dukes next argues that Huitt/Keller owed a duty under a premises liability analysis because they recognized the hazards existing in the Water Gardens and that drowning was a foreseeable event.[15] However, after reviewing the evidence in the light most favorable to Dukes, we determine that Huitt/Keller cannot be held liable under the general rule of premises liability because there is no dispute that Huitt/Keller was neither the owner nor occupier in exclusive control of the Water Gardens. Because the prerequisite to liability has not been met, Huitt/Keller cannot be held liable for the decedents' deaths. *See Page,* 701 S.W.2d at 835 (holding that the prerequisite to liability is whether the party is a "possessor" or "owner" of the premises, and if the party does not own, occupy, or otherwise control the premises, they cannot be held liable for dangerous conditions on the property).

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15. Dukes does not specify the hazard to which they are referring, but we presume that they are referring to "the hazard at the mouth of the Active Water Pool."

Appendix A

We next evaluate whether Dukes presented any controverting evidence that Huitt/Keller owed a duty under either of the recognized exceptions to the general rule of premises liability. Under these exceptions, a party may be held liable under a premises liability analysis only if the party has agreed to make safe a known, dangerous condition on the premises and failed to do so, or the party has created the dangerous condition. *See id.*

To determine whether the first exception applies, we examine the summary judgment evidence to determine whether Huitt/Keller ever expressly or implicitly agreed to make safe a known, dangerous condition. *See id.* (evaluating whether the City of Denton ever expressly or impliedly contracted to remedy any dangerous condition on the property).

Huitt/Keller's first contract with the City was executed on January 7, 1994. This contract required them to provide an architectural assessment of the Water Gardens and included the review of civil, structural, mechanical, and electrical engineering services.[16] Our review shows that the 1994 contract did

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16. Huitt/Keller's responsibilities under their 1994 contract were divided into three phases: the preliminary assessment phase ("30% Preliminary Review"), in which Huitt/Keller was required to "identify the primary areas of concern" and "tabulate all problem areas"; the final assessment phase, in which they were to "identify all problem areas contributing to multiple systems deterioration" and to "research and develop

(Cont'd)

not include an express provision requiring Huitt/Keller to conduct a review of safety issues; however, Dukes points to several extraneous documents that allegedly indicate that a safety review was within the scope of Huitt/Keller's duties. Dukes directs us to an April 11, 1995 document that recommends that the City execute a contract with Huitt/Keller. This document references the City Council's December 14, 1993 approval of a professional services contract with Huitt/Keller requiring Huitt/Keller to conduct an architectural assessment of the Water Gardens for "planning of remedial projects in order to address *safety,* structural, operational, and accessibility issues." [Emphasis added.] Dukes contends that this document is evidence that "safety was to be a primary concern" in Huitt/Keller's review of the Water Gardens.

We determine that although this evidence demonstrates that the City may have initially contemplated that Huitt/Keller was expected to address safety issues in their assessment of the Water Gardens, the actual contract between the City and Huitt/Keller imposed no responsibility upon Huitt/Keller to address or remedy safety issues that they discovered in the

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(Cont'd)
solution options for each of the problem types"; and, the assessment report phase, in which Huitt/Keller was to develop a report addressing each of the various problems and recommend solutions.

course of their assessment.[17] Nor did Huitt/Keller's 1995 and 2000 contractual agreements with the City demonstrate that Huitt/Keller expressly agreed to make safe a known, dangerous condition. Rather, the 1995 and 2000 contracts, respectively, required Huitt/Keller only to determine necessary design services for the construction of ADA improvements to the Cascade and Quiet Pools as well as review planning of future developments around the Water Gardens.

A review of each of Huitt/Keller's contracts with the City demonstrate that Huitt/Keller never expressly or impliedly agreed to make safe a known, dangerous condition. Nor has Dukes presented any evidence showing otherwise. And as we have previously stated, the scope of Huitt/Keller's duty is determined by their contracts with the City. *See I.O.I. Sys., Inc.*, 615 S.W.2d at 790 (holding that an architect's or engineer's duty depends on the particular agreement entered into with his employer). Furthermore, Dukes has failed to present any evidence raising a genuine issue of material fact that Huitt/Keller created the hazardous condition. *See Centeq Realty, Inc.*, 899 S.W.2d at 197.

Moreover, we are unpersuaded by Dukes's argument that liability should be imposed upon Huitt/Keller because they took "half-steps to address the potential hazard" by withdrawing their recommendation

17. The actual contract between the City and Huitt/Keller was executed on January 7, 1994, approximately three weeks after the City Council approved the professional services contract.

for safety barriers around the Active Water Pool in reliance on discussions with the City after submitting the 30% report. Once again, Dukes attempts to analogize this case to *Crown Derrick Erectors, Inc.*, 117 S.W.3d at 526, and once again, we determine that such reliance is misplaced. Dukes has not presented any evidence that Huitt/Keller ever agreed to correct any problems discovered in their work at the Water Gardens. Thus, *Crown Derrick's* analysis is inapplicable because there is no evidence that Huitt/Keller was "acting to correct a danger *it agreed to correct* and that arose out of its own work." *See* 117 S.W.3d at 526 (emphasis added). Therefore, no duty may be imposed upon Huitt/Keller for withdrawing their recommendation for safety barriers.

After reviewing the record, and viewing the evidence in a light most favorable to Dukes, we determine that Dukes has failed to present controverting evidence that a duty was imposed upon Huitt/Keller through premises liability.

D. Voluntary Undertaking

Lastly, Dukes argues that Huitt/Keller can be held liable for the decedents' deaths because Huitt/Keller undertook inspection of the Water Gardens' entire park pursuant to their 1994 agreement with the City.

Once again, we determine that Dukes's attempt to impose a duty through the voluntary undertaking theory necessarily fails. Specifically, even if Dukes presented

evidence that Huitt/Keller undertook a duty, liability still would not be imposed upon them because Dukes has failed to present a genuine issue of material fact that the City relied on Huitt/Keller's 1994 inspection of the Water Gardens or that their inspection of the Water Gardens increased the risk of harm. *See Entex*, 94 S.W.3d at 10.

Although Dukes asserts that liability may be imposed because Huitt/Keller incorporated a recommendation for safety barriers around the Active Water Pool in their preliminary report and suggested that the City post signs or warnings around the Active Water Pool in their final report, Dukes has not presented evidence that the City relied on these recommendations. Indeed, the summary judgment evidence shows that the City chose not to implement any of Huitt/Keller's recommendations or any other modification that Huitt/Keller suggested pursuant to their 1994 assessment of the Water Gardens. Specifically, the summary judgment evidence shows that the City rejected these recommendations because it felt that the "liability potential [was] not high," and although the Active Water Pool was "potentially dangerous," "people have not been falling in." Thus, the evidence is clear that the City did not rely on any alleged undertaking that Huitt/Keller may have assumed.

Furthermore, Huitt/Keller's inspection of the Water Gardens did not increase the risk of harm. Dukes has failed to present evidence showing that any risk of harm from the Water Gardens was greater as a result of Huitt/

Keller's assessment than it had been before the assessment. *See Entex*, 94 S.W.3d at 10. In contrast, the uncontroverted evidence shows that at the time of Huitt/Keller's 1994 assessment of the Water Gardens, the City knew of the danger that the Active Water Pool posed.[18] For example, the record shows that in 1994, the City was aware of the dangers posed by the Active Water Pool but that it reasoned that the "liability potential [was] not high." Moreover, the record also contains evidence that as early as 1974, the City knew of the dangers posed by the Active Water Pool. Indeed, the City's attorney expressed his concern to the director of Parks and Recreation that there were:

> dangerous and hazardous conditions existing in the nature of deep, exposed open pit areas with steep embankments lubricated with flowing water into which children of all ages can readily fall and slide.

The record also shows that a safety audit was conducted in 1974 that alerted the City that "should someone fall into [the Active Water Pool,] it would be practically impossible for them to get out without adequate help." This evidence demonstrates that the risk of harm was equally as great before Huitt/Keller conducted their assessment in 1994 as it was after their assessment. And Dukes has not presented evidence showing otherwise.

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18. Dukes acknowledges that the "dangers of the Active Water Pool existed at the time of both the 1994 assessment by [Huitt/Keller] and [the] 1999 comprehensive review by [Johnson/Ritchie and Johantgen]."

Because there is no genuine issue of material fact that the City relied on Huitt/Keller's 1994 inspection of the Water Gardens or that such inspection increased the risk of harm, we conclude that Dukes has failed to show that Huitt/Keller voluntarily undertook a duty through their 1994 inspection of the Water Gardens.

E. Conclusion

Even viewed in a light most favorable to Dukes, there is insufficient evidence to create a genuine issue of material fact that Huitt/Keller owed or assumed any duty to the decedents. Accordingly, we overrule Dukes's issues five through eight and affirm the trial court's summary judgment as to Huitt/Keller.

VIII. Austin

In issues nine, ten, and eleven, Dukes asserts that the trial court erred by granting summary judgment in favor of Austin because the evidence demonstrates that there were safety hazards at the Active Water Pool that were known to Austin's subcontractors, and yet no action was taken; where Austin owed duties to the public; and where Austin's failure to safeguard the hazards at the Active Water Pool contributed to the cause of decedents' deaths.[19]

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19. Again, Dukes does not specify the hazard to which they are referring, but we presume that they are referring to "the hazard at the mouth of the Active Water Pool."

Appendix A

A. Applicable Facts

In 2001 through 2002, Austin was under contract with the City to act as the project manager for the Project. Under the original contract, Austin was both the construction manager and program manager, which meant that it had the "exclusive control of, and the exclusive right to control the details of the work performed" in conjunction with the Project.

After the City began renovating the Convention Center, it became imperative for the City to also update the Water Gardens. Subsequently, the City and Austin entered into two amendments to the original contract. The second amendment provided that Austin would contract with Johnson/Ritchie "for the preparation of a Master Plan for the incorporation of the Water Gardens into the Project." However, none of Austin's work concerned the Active Water Pool.

B. Analysis

Dukes argues that Austin was responsible for the negligence of the architects and engineers whose work it supervised and coordinated because under the original and amended contracts, Austin possessed the right to control the work of individuals whom it coordinated.[20] Thus, because Austin retained control of

20. Although Dukes raises three issues on appeal as to Austin, the only argument that is analyzed and supported by law is their contention that by retaining control over their subcontractor's work, Austin is responsible for their negligence. Therefore, this is the argument that we now address.

their work, Dukes asserts that Austin was responsible for the errors and omissions of its subcontractors.[21]

We have closely reviewed the record in this case for evidence supporting Dukes's contention that liability should be imposed upon Austin; however, we are unpersuaded by Dukes's arguments. Even if Austin's contract with the City imposed a duty upon it, Austin still could not be held liable for the negligence of its subcontractors simply because Dukes failed to present evidence demonstrating that these subcontractors owed a duty to decedents. *Phillips,* 801 S.W.2d at 525. By failing to establish the threshold issue of duty, the issue of whether the subcontractors were negligent could not be reached. *Id.* Therefore, any inquiry into whether Austin may be held liable for its subcontractors is a nonissue. Accordingly, we overrule Dukes's issues nine, ten, and eleven and affirm the trial court's summary judgment as to Austin.

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21 "Subcontractors" incorporates Johnson/Ritchie as well as Johantgen who was retained by Johnson/Ritchie to act as a consultant in their 1999 assessment of the Water Gardens.

Appendix A

IX. Conclusion

Because Dukes has failed to present competent, controverting evidence raising a genuine issue of material fact that Johnson/Ritchie, Johantgen, Huitt/Keller, or Austin owed a duty to the decedents, we affirm the trial court's summary judgment as to each of these parties. *See Centeq Realty, Inc.*, 899 S.W.2d at 197.

BOB MCCOY
JUSTICE

PANEL B: LIVINGSTON, WALKER, and MCCOY, JJ.

DELIVERED: March 27, 2008

APPENDIX B — FINAL SUMMARY JUDGMENT OF THE DISTRICT COURT OF TARRANT COUNTY, TEXAS, 141ST JUDICIAL DISTRICT DATED APRIL 10, 2007

IN THE DISTRICT COURT OF
TARRANT COUNTY, TEXAS
141ST JUDICIAL DISTRICT

CAUSE NO. 141-207538-04

STEPHANIE DUKES, Individually, et al.

Plaintiffs,

v.

PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS, et al.

Defendants.

FINAL SUMMARY JUDGMENT

The Court heard the Motion for Summary Judgment of Defendant Linbeck Construction Corp. on May 12, 2006 and granted that Motion by order signed on May 25, 2006.

The Court heard the Motion for Summary Judgment of Defendant Fred Kent on May 12, 2006 and granted that Motion by order signed on May 25, 2006.

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The Court heard the Motion for Summary Judgment of Defendants Huitt-Zollars, Inc. and Emile Keller on September 21, 2006, but has not previously ruled on it.

The Court heard the Motion for Summary Judgment of Defendant Downtown Fort Worth, Inc. on September 21, 2006, but has not previously ruled on it.

The Court heard the Motion for Summary Judgment of Defendant Carter S. Burgess, Inc. on September 21, 2006, but has not previously ruled on it.

The Court heard the Motion for Summary Judgment of Defendant Thos. S. Byrne, Inc. and Thos. S. Byrne, Ltd. on September 21, 2006 and granted that Motion by order signed on October 3, 2006.

The Court heard the Motion for Summary Judgment of Defendants Alan Ritchie/David Fiore Architects, P.C. and David Fiore on January 4, 2007, but has not previously ruled on it.

The Court heard the Motion for Summary Judgment of Defendants Philip Johnson/Alan Ritchie Architects, P.C., Philip Johnson, Ritchie & Fiore Architects, P.C., David G. Whitney, Executor of the Estate of Philip Johnson, Deceased and Alan Ritchie on January 4, 2007, but has not previously ruled on it.

The Court heard the Motion for Summary Judgment of Defendants Peter Johantgen Consulting, Inc. and Peter Johantgen on January 4, 2007, but has not previously ruled on it.

Appendix B

The Court heard the Motion for Summary Judgment of Defendant Austin Commercial, Inc. on January 5, 2007, but has not previously ruled on it.

The Court considered the Motion for Summary Judgment of Defendants Hellmuth, Obata & Kassabaum, Inc. and Steven Brubaker and granted that motion by order dated January 5, 2006.

On February 16, 2007, the Court heard the Motion for Summary Judgment filed in this cause by the Amon G. Carter Foundation and is of the opinion and finds that the motion for summary judgment should be and is hereby GRANTED.

The Court is of the further opinion and finds that the Motions for Summary Judgment of Defendants Huitt-Zollars, Inc. and Emile Keller, Downtown Fort Worth, Inc., Carter & Burgess, Inc., Alan Ritchie/David Fiore Architects, P.C., and David Fiore, Philip Johnson/ Alan Ritchie Architects, P.C., Philip Johnson, Ritchie & Fiore Architects, P.C., David G. Whitney, Executor of the Estate of Philip Johnson, Deceased and Alan Ritchie, Peter Johantgen Consulting, Inc. and Peter Johantgen, and Austin Commercial, Inc. should be and are hereby GRANTED.

The Court further finds that the collective effect of the summary judgments granted in this and prior orders is to dispose of all of the claims of all the parties to this cause. Therefore, it is ORDERED, ADJUDGED, AND DECREED that Plaintiffs take nothing against

Appendix B

Defendants Amon G. Carter Foundation, Linbeck Construction Corp., Fred Kent, Huitt-Zollars, Inc., Emile Keller, Downtown Fort Worth, Inc., Carter & Burgess, Inc., Thos. S. Byrne, Inc., Thos. S. Byrne, Ltd., Alan Ritchie/David Fiore Architects, P.C., David Fiore, Philip Johnson/Alan Ritchie Architects, P.C., Philip Johnson, Ritchie & Fiore Architects, P.C., David G. Whitney, Executor of the Estate of Philip Johnson, Deceased, Alan Ritchie, Austin Commercial, Inc., Hellmuth, Obata & Kassabaum, Inc., Steven Brubaker, Peter Johantgen Consulting, Inc., and Peter Johantgen, that all claims asserted by Plaintiffs are denied, and that all costs of court be taxed against the party incurring them.

All relief requested in this case and not expressly granted is denied. This judgment finally disposes of all parties and claims and is appealable.

SIGNED April 10, 2007.

s/ [illegible]
JUDGE PRESIDING

APPENDIX C — ORDER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW DATED JUNE 27, 2008

SUPREME COURT OF TEXAS

DATE: 6/27/2008

RE: Case No. 08-0350

COA #: 02-07-00095-CV

TC #: 141-207538-04

STEPHANIE DUKES, ET AL.

v.

PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS, P.C., ET AL.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

APPENDIX D — ORDERS ON MOTIONS FOR REHEARING OF THE SUPREME COURT OF TEXAS DATED AUGUST 15, 2008

THE SUPREME COURT OF TEXAS

Orders Pronounced August 15, 2008

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING OF THE FOLLOWING PETITIONS FOR REVIEW ARE DENIED:

* * *

08-0350 STEPHANIE DUKES, ET AL. v. PHILIP JOHNSON/ALAN RITCHIE ARCHITECTS, P.C.. ET AL.; from Tarrant County; 2nd district (02-07-00095-CV, 252 SW3d 586, 03-27-08)

* * * *